Merits of the Doctrine of Precedents

It shows respect to one ancestors’ opinion. Eminent jurists like Coke and Blackstone have supported the doctrine on this ground. The say that there are always some reasons behind these opinions, we may or may not understand them.

Precedents are based on customs, and therefore, they should be followed. Courts follow them because these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

As a matter of great convenience, it is necessary that a question once decided should be settled and should not be subject to re-argument in every case in which it arises.  It will save the labor of the judges and the lawyers.

Precedents bring certainty in the law. If the courts do not follow precedents and the judges start deciding and determining issues every time afresh without having regard to the previous decisions on the point, the law would become the most uncertain.

Precedents bring flexibility to law. Judges in giving their decisions are influenced by social, economic and many other values of their age. They mold and shape the law according to the changed conditions and thus bring flexibility to law.

Precedents are Judge made law. Therefore, they are more practical. They are based on cases. It is not like statue law which is based on a priori theory. The law develops through precedents according to actual cases.

Precedents bring scientific development to law. In a case, Baron Parke observed ‘It appears to me to be great importance to keep the principle of decision steadily in view, not merely for the determination of the particular case, but for the interest of law as a science.’

Precedents guide judges and consequently, they are prevented from committing errors which they would have committed in the absence of precedents. Following precedents, judges are prevented from any prejudice and partially because precedents are binding on them. By deciding cases on established principles, the confidence of the people on the judiciary is strengthened.

As a matter of policy, decisions, once made on principal should not be departed from in ordinary course.

Demerits of the Doctrine of Precedents

There is always a possibility of overlooking authorities. The vastly increasing number of cases has an overwhelming effect on the judge and the lawyer. It is very difficult to trace out all the relevant authorities on the very point.

Sometimes, the conflicting decisions of superior tribunal throw the judge of a lower court on the horns of a dilemma. The courts faced with what an English judge called “complete fog of authorities.”

A great demerit of the doctrine of precedent is that the development of the law depends on the incidents of litigation. Sometimes, the most important points may remain unadjudicated because nobody brought an action upon them.

A very grave demerit or rather an anomaly of the doctrine of precedent is that sometimes it is the extremely erroneous decision is established as law due to not being brought before a superior court.

Factors undermining the authority of a precedent

1. Abrogated decisions – A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.
2. Same decision on appeal is reversed by the appellate court. – 24th amendment of Indian Constitution was passed to nullify the decision of the SC in the case of Golaknath.
3. Affirmation and Reversal on a Different Ground – A decision is affirmed or reversed on appeal on a different point.
4. Ignorance of Statute – A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute i.e. delegated legislation. A court may know of existence of the statute or rule and yet not appreciate in the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.
5. Inconsistency with Earlier Decision of Higher Court – A precedent is not binding if the court that decided it overlooked an inconsistent decision of a high court. High courts cannot ignore decision of Supreme Court of India.
6. Inconsistency with Earlier Decision of Same Rank – A court is not bound by its own previous decisions that are in conflict with one another. The court of appeal and other courts are free to choose between conflicting decisions, even though this might amount to preferring an earlier decision to a later decision.
7. Precedent *sub silentio*or not fully argued – When a point is not involved in a decision is not taken notice of and is not argued by a counsel, the court may decide in favour of one party, whereas if all the points had been put forth, the decision in favour of one party. Hence, such a rule is not an authority on the point which had not been argued and this point is said to pass *sub silentio.*Binding force of a precedent does not depend on whether a particular argument was considered therein or not, provided the point with reference to which an argument was subsequently advanced was actually decided by the SC.

Circumstances which increase the authority of a precedent

1. The number of judges constituting the bench and their eminence is a very important factor in increasing the authority of precedent.
2. A unanimous decision carries more weight.
3. Affirmation, approval or following by other courts, especially by a higher tribunal, adds to the strength of a precedent.
4. If an Act is passed embodying the law in a precedent, the gains an added authority.

Theories of precedents

Declaratory theory

This theory provides that,

Judges only discover law.

They discover and declare.

*Coke C.J.*: judicial decisions are not a source of law but the best proof of law is.

*Wiilis* v. *Baddeley*: there is no such thing as *judge-made*law.

*Rajeshwar Prasad* v.*State of West Bengal,*  AIR 1965 SC 1887, the same theory was upheld by the Supreme Court of India.

This theory was criticised on a number of grounds

*Bentham and Austin :*legislative power is not with Courts and they can not even claim it.

*Salmond :* both at law and in equity, however the declaratory theory must be totally rejected .

Precedents make law as well as declare it.

Judges have altered the law.

Judges make Law

*Lord Bacon:* the points which the judges decide in cases of first impression is a “distinct contribution to the existing law”.

*Prof. Gray:*Judges alone are the makers of Law.

*Pollock:*Courts themselves, in the course of the reasons given for those decisions constantly and freely use language admitting that they do.

This theory was criticised on a number of grounds

Judges cannot overrule a statute.

Where a statute clearly laid down the law, the judge has to enforce it.

The judge is confined to the facts of the case while enunciating legal principles.  Within those limits alone it can be said that judges make law.

After this brief discussion about the nature, definitions and authority of precedents let us move on to look at the value of precedents in different countries in the world.

Comparison between different legal systems

U.S. legal system

In the United States, which uses a common law system in its state courts and to a lesser extent in its federal courts, the Ninth Circuit Court of Appeals has stated:

Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et quieta non movere — “to stand by and adhere to decisions and not disturb what is settled.” Consider the word “decisis.” The word means, literally and legally, the decision. Nor is the doctrine stare dictis; it is not “to stand by or keep to what was said.” Nor is the doctrine stare rationibus decidendi — “to keep to the rationes decidendi of past cases.” Rather, under the doctrine of stare decisis a case is important only for what it decides — for the “what,” not for the “why,” and not for the “how.” Insofar as precedent is concerned, stare decisis is important only for the decision, for the detailed legal consequence following a detailed set of facts.

In other words, stare decisis applies to the holding of a case, rather than to obiter dicta (“things said by the way”). As the United States Supreme Court has put it: “dicta may be followed if sufficiently persuasive but are not binding.”

In the United States Supreme Court, the principle of stare decisis is most flexible in constitutional cases:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. … But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. … This is strikingly true of cases under the due process clause.[3]

For example, in the years 1946–1992, the U.S. Supreme Court reversed itself in about 130 cases. The U.S. Supreme Court has further explained as follows:

When convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions.[4]

English legal system

The doctrine of binding precedent or stare decisis is basic to the English legal system, and to the legal systems that derived from it such as those of Australia, Canada, Hong Kong, New Zealand, Pakistan, Singapore, Malaysia and South Africa. A precedent is a statement made of the law by a Judge in deciding a case. The doctrine states that within the hierarchy of the English courts a decision by a superior court will be binding on inferior courts. This means that when judges try cases they must check to see if similar cases have been tried by a court previously. If there was a precedent set by an equal or superior court, then a judge should obey that precedent. If there is a precedent set by an inferior court, a judge does not have to follow it, but may consider it. The House of Lords (now the Supreme Court) however does not have to obey its own precedents.

Only the statements of law are binding. This is known as the reason for the decision or ratio decidendi. All other reasons are “by the way” or obiter dictum. See *Rondel v. Worsley*[5]. A precedent does not bind a court if it finds there was a lack of care in the original “Per Incuriam”. For example, if a statutory provision or precedent had not been brought to the previous court’s attention before its decision, the precedent would not be binding. Also, if a court finds a material difference between cases then it can choose not to be bound by the precedent. Persuasive precedents are those that have been set by courts lower in the hierarchy. They may be persuasive, but are not binding. Most importantly, precedents can be overruled by a subsequent decision by a superior court or by an Act of Parliament.

Civil Law System

*Stare decisis*is not usually a doctrine used in civil law court system, because it violates the principle that only the legislature may make law. In theory therefore, lower courts are generally not bound to precedents established by higher courts. In practice, the need to have predictability means that lower courts generally defer to precedents by higher courts and in a sense, the highest courts in civil law jurisdictions, such as the *Cour de cassation* and the *Conseil d’État* in France are recognized as being bodies of a quasi-legislative nature.

The doctrine of stare decisis also influences how court decisions are structured. In general, court decisions in common law jurisdictions are extremely wordy and go into great detail as to the how the decision was reached. This occurs to justify a court decision on the basis of previous case law as well as to make it easier to use the decision as a precedent in future cases.

By contrast, court decisions in some civil law jurisdictions (most prominently France) tend to be extremely brief, mentioning only the relevant legislation and not going into great detail about how a decision was reached. This is the result of the theoretical view that the court is only interpreting the view of the legislature and that detailed exposition is unnecessary. Because of this, much more of the exposition of the law is done by academic jurists which provide the explanations that in common law nations would be provided by the judges themselves.

In other civil law jurisdictions, such as the German-speaking countries, court opinions tend to be much longer than in France, and courts will frequently cite previous cases and academic writing. However, e.g. German courts put less emphasis of the particular facts of the case than common law courts, but on the discussion of various doctrinal arguments and on finding what the correct interpretation of the law is.

Indian Legal System

Indian Law is largely based on English common law because of the long period of British colonial influence during the period of the British Raj.

After the failed rebellion against the British in 1857, the British Parliament took over the reign of India from the British East India Company, and British India came under the direct rule of the Crown. The British Parliament passed the Government of India Act of 1858 to this effect, which set up the structure of British government in India. It established in England the office of the Secretary of State for India through whom the Parliament would exercise its rule, along with a Council of India to aid him. It also established the office of the Governor-General of India along with an Executive Council in India, which consisted of high officials of the British Government.

Much of contemporary Indian law shows substantial European and American influence. Various legislations first introduced by the British are still in effect in their modified forms today. During the drafting of the Indian Constitution, laws from Ireland, the United States, Britain, and France were all synthesized to get a refined set of Indian laws, as it currently stands. Indian laws also adhere to the United Nations guidelines on human rights law and the environmental law. Certain international trade laws, such as those on intellectual property, are also enforced in India.

Indian family law is complex, with each religion adhering to its own specific laws. In most states, registering marriages and divorces is not compulsory. There are separate laws governing Hindus, Muslims, Christians, Sikhs and followers of other religions. The exception to this rule is in the state of Goa, where a Portuguese uniform civil code is in place, in which all religions have a common law regarding marriages, divorces and adoption.

Ancient India represented a distinct tradition of law, and had an historically independent school of legal theory and practice. The *Arthashastra*, dating from 400 BC and the *Manusmriti*, from 100 AD, were influential treatises in India, texts that were considered authoritative legal guidance. Manu’s central philosophy was tolerance and pluralism, and was cited across Southeast Asia. Early in this period, which finally culminated in the creation of the Gupta Empire, relations with ancient Greece and Rome were not infrequent. The appearance of similar fundamental institutions of international law in various parts of the world show that they are inherent in international society, irrespective of culture and tradition. Inter-State relations in the pre-Islamic period resulted in clear-cut rules of warfare of a high humanitarian standard, in rules of neutrality, of treaty law, of customary law embodied in religious charters, in exchange of embassies of a temporary or semi-permanent character. When India became part of the British Empire, there was a break in tradition, and Hindu and Islamic law were supplanted by the common law. As a result, the present judicial system of the country derives largely from the British system and has little correlation to the institutions of the pre-British era.

There are 1160 laws as on September 2007

In India, stare decisis is strictly followed and these are the general principles of stare decisis followed in India.

Each court is absolutely bound by the decisions of the higher courts above it.

Decision of one of the high courts is not binding on any other high court. They have only persuasive value.

In India, Supreme Court is not bound by its own decision.

A single bench is bound by the decision of a division bench of the same high court but a division bench is not to follow a decision of a single bench of the same high court.

Conclusion

From the brief discussion above about the legal value of precedents we can clearly infer that these play a very important role in filling up the lacunas in law and the various statues. These also help in the upholding of customs that influence the region thereby making decisions morally acceptable for the people. This thereby increases their faith in the judiciary which helps in legal development.

These moreover being a sort of respect for the earlier views of various renowned jurists, helps in upholding the principle of stare decisis. It is a matter of great convenience it is necessary that a question once decided should be settled and should not be subject to re-argument in every case in which it arises.  It will save labour of the judges and the lawyers. This way it saves lots of time for the judiciary which is a real challenge in the present day legal system with so many cases still pending for many years now. Precedents bring certainty in law.

If the courts do not follow precedents and the judges start deciding and determining issues every time afresh without having regard to the previous decisions on the point, the law would become the most uncertain. Precedents bring flexibility to law. Judges in giving their decisions are influenced by social, economic and many other values of their age. They mould and shape the law according to the changed conditions and thus bring flexibility to law.

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